

# Opposition Rights in Parliamentary Democracies

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## A. Introduction

Populists and constitutional democrats differ fundamentally in their stances toward the *opposition* and *institutional procedures*. As Nadia Urbinati explains, for the constitutional democrat, “*no majority is the last one*, because the rules of the game are never revoked” and “a change of government is always possible”.<sup>1</sup> It follows that political majorities must “neither ... humiliate the opposition nor ... make it incapable in practice (if not in theory) to challenge the majority in power”.<sup>2</sup> In this formulation, the opposition has to be understood not broadly, as the array of individuals and organizations that oppose the government of the day, but narrowly, as what Giovanni Sartori terms the “constitutional opposition”.<sup>3</sup> In this specific sense, the opposition consists of political parties which contend for power within the institutions of democracy and seek to replace the government through the electoral process. Political authority, as Nancy Rosenblum argues, is always provisional.<sup>4</sup> By contrast, populists, once in power, view themselves as the “only ‘good’ representative of the people”, with any respect accorded to the opposition “uncertain and contingent”.<sup>5</sup> The governing party is always one step away from denouncing and destroying the opposition party – as Carl Schmitt put it, by “declaring their domestic competitors illegal” as a political enemy and to put an end of the idea of “unconditional

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<sup>1</sup> Nadia Urbinati, *Me the People: How Populism Transforms Democracy* (Harvard University Press, 2019) at 91 and 12 (italics in original).

<sup>2</sup> Urbinati at 91-2.

<sup>3</sup> Giovanni Sartori, “Opposition and Control: Problems and Prospects” (1966) 1 *Government and Opposition* 149 at 150.

<sup>4</sup> Nancy Rosenblum, *On the Side of Angels: An Appreciation of Parties and Partisanship* (Princeton University Press, 2008).

<sup>5</sup> Urbinati at 91.

equal chance”.<sup>6</sup> Institutional procedures – for legislation, administration, and adjudication – are likewise integral to the idea of constitutional democracy itself and are implied by the separation of powers and the rule of law. Indeed, it is the legitimacy of these procedures that enables political disagreements to be channeled into them and yield institutional settlement. But as Sam Issacharoff observes, populism is defined by “hostility to established institutional pathways”, such that “norms of governing are not matters of statecraft to be learned”, but rather “obstacles to the politics of immediacy”.<sup>7</sup>

In this Article, I explore a topic at the intersection of these two themes: how constitutional design should provide a role for opposition political parties in institutional procedures for political decision-making. I nest my answer within a broader theory of constitutional democracy, which views a constitution as providing a framework for bounded, partisan, pluralist contestation among political parties that track and major economic and social cleavages of a political community, through regular, periodic elections with universal adult suffrage in which these parties compete for power.<sup>8</sup> Political parties consider it to be to their mutual advantage to compete for power within a constitutional system, rather than stepping outside of it and seizing power through force or fraud.<sup>9</sup> The process of institutionalized competition within which political conflict occurs does not undermine constitutional stability; rather, it reinforces it through iteration. I claim that this a generic theory for any constitutional democracy. While it bears a family resemblance to Barry Weingast’s model of constitutional self-enforcement, it differs by making political parties the basic units of analysis and competitive elections a necessary feature.<sup>10</sup>

On this occasion, I narrow and extend this argument. I limit my focus to opposition parties in parliamentary democracies, where the executive governs if it enjoys the confidence of the

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<sup>6</sup> Carl Schmitt, *Legality and Legitimacy*, translated by Jeffrey Seitzer (Duke University Press, 1996) at 31 and 28.

<sup>7</sup> Samuel Issacharoff, *Unmoored: Populism and the Corruption of Democracy* (forthcoming), Section II, ch. 1.

<sup>8</sup> Sujit Choudhry, “Resisting democratic backsliding: An essay on Weimar, self-enforcing constitutions, and the Frankfurt School” (2019) 7 *Global Constitutionalism* 54; Sujit Choudhry, “Will democracy die in darkness? Calling autocracy by its name”, in Mark Graber, Sanford Levinson & Mark Tushnet, eds., *Constitutional Democracies in Crisis?* (Oxford University Press, 2018) 571.

<sup>9</sup> Stephen Holmes puts this point well: “[r]ather than burning dumpsters at intersections, discontented citizens can be lured into organizing for the next elections, expending the fuel of political grievance and letdown on party-political competition, so long as the system is not blatantly rigged against them and they have a reasonable chance of prevailing in the future”. Stephen Holmes, “How Democracies Perish” in Cass Sunstein, ed., *Can it Happen Here? Authoritarianism in America* (HarperCollins, 2018) 387 at 390.

<sup>10</sup> Barry R. Weingast, “The Political Foundations of Democracy and the Rule of Law” (1997) 91 *American Political Science Review* 245.

legislature. Although their political dynamics are distinct, I include in my definition of parliamentary democracies semi-presidential systems, which combine a directly elected president with a prime minister and cabinet that command the confidence of legislature, and which function like parliamentary systems when the same party controls the presidency and the cabinet. Together, parliamentary democracies and semi-presidential regimes account for approximately 100 states.<sup>11</sup> I do not address the applicability of the concept of opposition rights to presidential systems, which I defer to another occasion.<sup>12</sup> I cast my gaze beyond electoral competition to the period after the election, which yields a governing party that controls executive power, and minority of legislators from different political parties that oppose them.

With these qualifications, the general question I posed above becomes a more specific one: what institutionalized role should constitutions give to opposition legislators in the law-making process in parliamentary democracies? Constitutions confer on individual legislators the right to speak against and vote against government bills. I argue that constitutions should go further and create a regime of *opposition rights*. I define opposition rights as an institutionalized power possessed by a formally designated party group or by a fraction of legislators or by a formally recognized opposition leader, that encompasses but go beyond rights of individual legislators to speak and vote against government bills. Regimes of opposition rights have three components. First, they create an opposition team through provisions that encourage the aggregation of, or coordination among, opposition legislators to act collectively. Second, they confer rights exercisable by the opposition team or its recognized leaders that further one or both of the key functions of opposition parties: (a) to scrutinize the conduct of the executive and hold it accountable through powers of oversight; and (b) to provide a government-in-waiting through agenda-setting powers. Third, they contain an enforcement mechanism, consisting of constitutional court referrals and/or speakers of the legislature.

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<sup>11</sup> I base this figure on the Bjørnskov-Rode dataset (posted at <http://www.christianbjoernskov.com/wp-content/uploads/2020/09/Bj%C3%B8rnskov-Rode-integrated-dataset-v3.2.xlsx>), which I then manually adjusted to change entries to reflect the *de jure* constitution in force. See Christian Bjørnskov and Martin Rode, “Regime Types and Regime Change: A New Dataset on Democracy, Coups, and Political Institutions” (2020) 15 *Review of International Organizations* 531.

<sup>12</sup> While the original example of a presidential regime is the United States, such constitutional systems are widespread in Africa and Latin America and are also present in Asia. To be sure the minority party in lower and upper chambers can create an oppositional dynamic akin to that in parliamentary systems, as is reflected in debates over the Senate filibuster in the United States. However, the direct election of the executive and the possibility of different parties in control of the presidency and each legislative chamber creates a complex configuration of power that is highly variable. To be sure, presidential systems can resemble parliamentary systems when one party controls both branches. However, where branches under the control of different parties who therefore control governmental power, it is unclear which party is in the opposition.

This definition of opposition rights enables us to organize a disparate set of particulars from constitutional design into a coherent framework and enables us to see more clearly their rationales and interrelationships, as well as the trade-offs among them. Although I rely heavily on examples, my project is *not empirical*. Rather, I offer a reconstructive, interpretive account of constitutional practice. In some cases, we should reinterpret procedures and doctrines – for example, the multi-stage legislative process – as an opposition right and defend them as such. In addition, with respect to constitutional interpretation, this account of opposition rights can orient their judicial enforcement, by clarifying precisely what interests they protect. Analogous to how Daryl Levinson and Rick Pildes argued that the effectiveness of the separation of powers in the United States requires that different branches be under the control of different political parties, I argue that some opposition rights have been misunderstood by the courts as furthering separation of powers goals (e.g. legislative control of the executive, bicameralism), when in fact they are better understood protecting the rights of opposition political parties against the governing party.<sup>13</sup> I rely on case-studies of constitutional decisions from Germany, India, South Africa and United Kingdom to illustrate how judicial enforcement of opposition rights does and should occur.

This article contributes to three scholarly debates. First, there is a burgeoning literature in comparative constitutional law on the comparative law of democracy, centred on the problem of democratic decay.<sup>14</sup> The concept of opposition rights is largely absent from this growing body of work. For example, Tom Ginsburg and Aziz Huq describe an autocrat’s toolkit consisting of electoral fraud, manipulation of the rules of electoral competition, abuse of the bureaucratic rule of law, and patronage and clientelism, but devote little attention to attacks on the role of the opposition parties in the legislative process.<sup>15</sup> Incorporating opposition rights into the analysis

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<sup>13</sup> Daryl Levinson and Richard H. Pildes, “Separation of Parties, Not Powers” (2006) 119 *Harvard Law Review* 2311.

<sup>14</sup> e.g. Sujit Choudhry, “ ‘He had a mandate’: The South African Constitutional Court and the African National Congress in a Dominant Party Democracy” (2009) 2 *Constitutional Court Review* 1; Rosalind Dixon and David Landau, “Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendment” (2015) 13 *ICON* 606; Stephen Gardbaum, “Comparative Political Process Theory” *ICON* (forthcoming); Mark Graber, Sandy Levinson and Mark Tushnet, eds., *Constitutional Democracy in Crisis?* (Oxford University Press, 2018); Michaela Hailbronner, “Combatting malfunction or optimizing democracy? Lessons from Germany for a comparative political process theory” *ICON* (forthcoming); Samuel Issacharoff, *Fragile Democracies* (Cambridge University Press, 2015); Issacharoff, *Unmoored: Populism and the Corruption of Democracy* (forthcoming); Tarunabh Khaitan, “Political Parties in Constitutional Theory”; David E. Landau, “Abusive Constitutionalism” (2013) 47 *U.C. Davis L. Rev* 189 (2013); Wojciech Sadurski, *Poland’s Constitutional Breakdown* (Oxford University Press, 2019); Kim Lane Scheppelle, “Autocratic Legalism” (2018) 85 *U. Chi. L. Rev.* 545.

<sup>15</sup> Tom Ginsburg and Aziz Z. Huq, *How to Save a Constitutional Democracy* (Chicago University Press, 2018) at 183.

of democratic breakdown has diagnostic and prescriptive payoffs. It enables us to identify new pathways of democratic backsliding, through the erosion of opposition rights. It also raises the question of whether opposition rights are a component of constitutional resilience, thereby broadening the institutional repertoire of constitutional democrats. Indeed, the present moment provides an opportunity to update the theory of opposition rights for the era of threats to constitutional democracy.

Second, the theory of opposition rights is an intervention in the literature on transitional, post-authoritarian democracies. For Samuel Huntington and Adam Przeworski, the benchmark of success was to create a consolidated democracy, defined as the alternation of political parties competing for power, cycling in and out of government and opposition, in a system of majoritarian pluralism.<sup>16</sup> The criticism of such a model is that its winner-take-all character could fuel the rise of dominant party democracies and create a permanent political opposition. So this model has quietly given way to the idea of inclusive or power-sharing democracies, bringing together old regime and new regime elites.<sup>17</sup> This model of constitutional design is also attractive in the overlapping, but distinct case, of deeply divided societies, where ascriptive differences (such as race, ethnicity and language) have become axes for political mobilization, under the label of consociationalism, with a grand coalition and mutual vetoes.<sup>18</sup> In these systems, by deliberate design, there is often no opposition *per se*. The problem is that power-sharing poses the risk of creating an elite cartel that institutionalizes corruption and is not accountable and responsive to the public (as we now see in Lebanon and Iraq). Opposition rights could potentially offer a third way, that presupposes political competition and alternation (like majoritarian pluralism), but which also institutionally empowers the opposition (like power-sharing) in a way that keeps opposition parties outside of the government.

Third, in comparative politics, some attention has been given to the theory of parliamentary opposition in consolidated and transitional democracies. Writing in 1965, Ronald Dahl stated that there were “three great milestones in the development of democratic institutions – the right to participate in governmental decisions by casting a vote, the right to be represented, and the right of an organized opposition to appeal for votes against the government

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<sup>16</sup> Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, 1991) and Adam Przeworski, *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America* (Cambridge University Press, 1991).

<sup>17</sup> e.g., see Sujit Choudhry & Richard Stacey, *Semi-Presidentialism as Power-Sharing: Constitutional Reform after the Arab Spring* (Center for Constitutional Transitions and International IDEA, 2014); Sujit Choudhry, Thomas Sedelius & Julia Kyrychenko, *Semi-presidentialism and Inclusive Governance in Ukraine: Reflections for Constitutional Reform* (Center for Constitutional Transitions, Center of Policy and Legal Reform, and International IDEA, 2018).

<sup>18</sup> Sujit Choudhry, ed., *Constitutional Design for Divided Societies* (Oxford University Press, 2008).

in elections and in Parliament”, and observed that among these three, the last is “a comparative rarity” which “means that it must be exceedingly difficult to *introduce* such a system, or to *maintain* it, or both.”<sup>19</sup> Despite Dahl’s call to action, parliamentary oppositions remain an understudied topic in political science, in relative terms. Part of my strategy in this paper is to line up the standard account of opposition functions with the empirics of constitutional design. While the two align considerably, they diverge in an important respect – the need for enforcement mechanisms, especially constitutional courts.

## **B. From Waldron’s loyal opposition to opposition rights**

In “The Principle of Loyal Opposition”, Jeremy Waldron tries to make sense of the constitutional status of Her Majesty’s Loyal Opposition in Westminster, and to abstract from it a theory of “loyal opposition” that is applicable to any parliamentary regime, in the Commonwealth or elsewhere. His key point is that an opposition can stridently oppose the government of the day but nonetheless be loyal to the constitutional regime within which it contends for power. In a key passage, he writes:

[w]e talk about free speech and a tolerant political culture – but I want to emphasize that the principle of loyal opposition goes far beyond that. It is not just the negative idea of not treating one’s opponents as though they were enemies of society; it is not just the idea of legitimizing dissent or freedom of speech and the right to publicly and legitimately oppose the policies and actions of the government of the day. It is not just the idea that one can oppose actively and, in an organization devoted to such opposition, continually criticize and proclaim alternatives to government policies. It is not just the idea of legitimizing vehement organized opposition, opposition seeking to discredit ministers and officials, and actively seeking to supplant the government that won the election without being labelled a subversive or a traitor. All of that is important, but the idea of loyal opposition is also positive empowerment by the creation and sponsoring of an official recognized role within the constitutional fabric.<sup>20</sup>

This passage describes two different kinds of constitutional status for opposition political parties, *negative toleration* and *positive empowerment*. Negative toleration is rooted in the interaction of the fact of political disagreement and the liberal freedoms of expression, association and assembly. It permits the exercise of those freedoms for political aims. The liberal

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<sup>19</sup> Ronald Dahl, Preface in Ronald Dahl, ed. *Political Opposition in Western Democracies* (Yale University Press, 1965) at xiii-xiv (italics in original).

<sup>20</sup> Jeremy Waldron, *Political Theory* (OUP, 2016) at 105-6 (internal citations removed).

freedoms can be exercised individually but also collectively through associations, which can take a variety of forms – interest groups, NGOs, social movements, organized religion, unions and political parties – that is, the opposition in both the broader and narrower senses I described earlier. Associations can serve as platforms for political mobilization, and even to contend for political control of the government.

Positive empowerment, in contrast, begins from the fact that opposition legislators sit within a public institution. To be sure, negative toleration is a necessary component of the legal infrastructure for political parties, although political party law creates a complex regulatory scheme that cannot be redescribed as simply the institutionalization of negative liberty. As well, within legislatures, some of the activity of opposition MPs overlaps with the exercise of the liberal freedoms – chiefly, speaking in parliamentary debates in a coordinated fashion – but positive empowerment cannot be reduced to the liberal freedoms and goes beyond them in a number of senses. Positive empowerment presupposes that opposition legislators have a *collective identity* and *act collectively*, as opposed to merely coordinating their actions. Positive empowerment assumes that opposition legislators have an *official status* which houses this collective identity and activity – for example, taking a party position on proposed legislation, or posing questions to the government on matters of public administration and new challenges facing the country – and wield *public power* when doing so. Finally, positive empowerment creates a recognized leader – the Leader of Opposition – who stands at the head of this group of MPs. The net effect of these incidents of positive empowerment is to change the political meaning of the powers conferred on opposition MPs to speak and vote, so that they are not merely reducible to the aggregate of their individual actions.

To what ends are opposition parties empowered? Waldron sets out the two classic functions of the official opposition in Westminster – “accountability” and “preparation”.<sup>21</sup> Accountability is the oversight and scrutiny function of the opposition – that is, to ensure that “policies are to be presented and defended in an explicitly and officially sanctioned adversarial environment”.<sup>22</sup> The role of the opposition is to criticize the government variously for ineffectiveness, indifference, incompetence, and the abuse of power. Indeed, prior to the rise of cabinet government in the 18<sup>th</sup> century, and the massive growth the legislative role of Parliament in the 19<sup>th</sup> century, the original role of the Westminster Parliament was to oversee the Crown’s administration of the realm. Because of these tectonic shifts in British constitutional practice,

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<sup>21</sup> Waldron at 96.

<sup>22</sup> Waldron at 101 to 102.

“the Opposition is now the body through which the Commons now fulfils the greater part of the responsibility to hold the government to account”, as Grégoire Webber explains.<sup>23</sup>

In addition, the role of the opposition is to prepare to become the government in the event it wins the next election – that is, to be a “government-in-waiting”. As Waldron explains, “this duty ... affects the way in which the duty to criticize is performed”.<sup>24</sup> Criticism must be bundled with “a consistent program to be advocated in opposition and realized in office” – i.e. a “positive policy” that appeals to a “very broad proportion of the mass of the people that it may be called on at any time to govern” – i.e., that is both realistic and not extreme.<sup>25</sup> What this means is that in criticizing the government, the opposition must present a positive program, that is, a platform and counter-agenda of its own, which serves to discipline and channel its criticism.

Waldron writes against the backdrop of Westminster, but a similar conception of the constitutional role of the opposition through positive empowerment also arose in other parliamentary systems grappling with the issue of responsible government. G.W.F. Hegel, in his *Review of the Proceedings of the Estates Assembly of the Kingdom of Württemberg*, commenting on early 19<sup>th</sup> century German debates, argues that only “[t]he ill-informed believe that the opposition party is a party that is anti-government or anti-ministry as such”. Rather, he continues, “when the opposition attacks not merely individual ministerial measures ... but fights the ministry on each and every point”, its goal is “to be in the ministry itself”, which “is actually its greatest justification”.<sup>26</sup> In parallel, as Pierre Rosanvallon has written, François Guizot’s case for constitutional monarchy and responsible government in early 19<sup>th</sup> century France rejected the idea that “the opposition represented minority interests while alleviating the danger of a tyranny of the majority”, because that claim rested on a conceptual mistake – that the role of the opposition was merely to criticize.<sup>27</sup> Rather, for Guizot, the opposition must in addition “convince the people that it is right and the government is wrong and that it is capable of running the country effectively”.<sup>28</sup> It must therefore lay claim to the support of the majority. As Guizot put

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<sup>23</sup> Grégoire Webber, “Loyal Opposition and the Political Constitution” (2018) 37 *Oxford Journal of Legal Studies* 357 at 370.

<sup>24</sup> Waldron at 102.

<sup>25</sup> Waldron at 102.

<sup>26</sup> Georg Wilhelm Friedrich Hegel: *Heidelberg Writings (Cambridge Hegel Translations)* (Cambridge University Press, Kindle Edition, 2009) at 43.

<sup>27</sup> Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (Cambridge University Press, 2008) at 156.

<sup>28</sup> *Ibid.* at 157.



it, just like the government, “the opposition is required to have a system and a future. It does not govern, but government is its necessary goal, for if it triumphs, it will have to govern”.<sup>29</sup>

The account of positive empowerment of the opposition yields some of the elements of opposition rights, specially the aggregation of individual opposition legislators into a team that acts collectively, to pursue the constitutionally mandated goals of: (a) criticizing and overseeing the executive’s conduct of public administration, and at the same time, (b) defining and promoting a governing agenda that presents itself as a credible alternative to a large proportion of the voting public. These constitutional features of opposition rights, which presuppose a system of political competition, and an institutional role for the opposition, cannot be captured by a rights-based analysis that attempts to reduce the exercise of opposition rights to the collective exercise of the liberal freedoms. They are a powerful comparative illustration of the criticism that Sam Issacharoff and Rick Pildes levelled at judicial oversight of the political process in the United States, when framed in terms of rights as opposed to the structure of competitive democratic politics.<sup>30</sup>

## C. Opposition rights in constitutional design

### 1. Introduction

I now spell out the precise institutional specification of these ideas – that is, the means whereby the building of an opposition team should be permitted, incentivized or mandated, and the precise powers that should flow from the opposition’s responsibility to “monitor ... and be a plausible government in waiting”, as Frances Rosenblum and Ian Shapiro put it.<sup>31</sup> The approach I take is comparative, so as to capture the full range of procedures and institutions that can fall under the definition of opposition rights. The Council of Europe has done so, in reports adopted by the Parliamentary Assembly<sup>32</sup> and the Venice Commission,<sup>33</sup> which led the Venice Commission to issue a checklist on opposition rights.<sup>34</sup> These documents organized and reported the practices

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<sup>29</sup> François Guizot, *Des moyens de government et d’opposition dans l’état actual de la France* (Paris, 1821) at 320.

<sup>30</sup> Samuel Issacharoff and Richard H. Pildes, “Politics as Markets: Partisan Lockups of the Democratic Process” (1998) 50 *Stanford Law Review* 643.

<sup>31</sup> Frances McCall Ronsblum and Ian Shapiro, *Responsible Parties: Saving Democracy from Itself* (Yale University Press, 2018) at 37.

<sup>32</sup> Parliamentary Assembly of the Council of Europe, “Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament” (PACE Resolution 1601).

<sup>33</sup> European Commission for Democracy through Law, “On the role of the opposition in a democratic Parliament”, CDL-13(2010)025.

<sup>34</sup> European Commission for Democracy through Law, “Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist”, CDL-AD(2019)/015.

of Council of Europe members, and relied on the texts of European constitutions and rules of parliamentary procedure.

My approach is different – to produce a taxonomy of constitutional provisions that create regimes of opposition rights at a *global* level, and to try to explain and justify them.<sup>35</sup> At the outset, let me state clearly that no constitution contains a subdivision entitled “opposition rights”. Rather, the constituent elements of what I have termed a regime of opposition rights are provisions scattered across constitutions and are found in bills of rights and chapters on legislative power, but also executive power, oversight institutions, and the judiciary. As I explain below, while some constitutions create and empower the Leader of the Opposition, the majority do not. Provisions on oversight and agenda-setting powers, in the vast majority of cases, do not refer to the opposition *per se*. So to conceive of these particulars of constitutional design as elements of a coherent regime is an act of constitutional interpretation, in the tradition of structuralism. Engaging in this creative exercise is important because when we see the components as part of a constitutional institution, various constitutional actors – courts, political elites, the public – can debate the meaning of their powers, functions and interrelationships within a shared argumentative framework. Moreover, this kind of conceptual work is logically prior to the coding of constitutional texts and quantitative analysis – indeed, opposition rights does not appear as a category in the [constituteproject.org](http://constituteproject.org) database.

## **2. Creating an opposition team**

Constitutions promote the creation of opposition teams in two ways. First, they create the permissive legal environment for the creation of political parties. The liberal freedoms of expression, association and assembly together require the negative toleration of political parties by the state. Political parties are products of exercises of freedom of expression by individuals, acting to assemble, associate and engage in political speech collectively.

However, some constitutions go further. They may expressly guarantee the right to form and belong to political parties. They might do so by including such a right as an illustrative example of the scope of a generic right to freedom of association.<sup>36</sup> Or they might entrench a separate right, as in South Africa, where the Constitution guarantees the right to form, participate

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<sup>35</sup> To be sure, many of the most detailed arrangements regarding opposition right are to be found in rules of parliamentary procedure, but for practical reasons, i.e. the limited availability of these sources in English, I cannot engage in that task in a systematic way on this occasion – although in the section on opposition rights and constitutional interpretation, I do analyze the relevant parliamentary rules.

<sup>36</sup> e.g. Barbados Const. (1966), Art. 21.

in the activities of, recruit members for, and campaign for, a political party.<sup>37</sup> Alternatively, they may protect the right to form a political party impliedly as a component of the right to non-discrimination, on the basis of political party membership, political belief or opinion, or political affiliation.<sup>38</sup>

It is worth observing that these rights are not confined to members of opposition political parties; they can be exercised, in principle, by members of all political parties, which may be particularly important, for example, with respect to constitutional requirements of internal party democracy, as in Germany.<sup>39</sup> Moreover, this kind of right is consistent with a variety of democratic systems in which political parties are the basic units of political organization, e.g. consociationalism. Finally, they do not themselves extend into the legislative process, and grant opposition parties opposition rights. As a practical matter, however, these rights are more likely operate to the benefit of opposition parties. Moreover, they should be seen as directed at three audiences. First, they are aimed at the judiciary, to avoid any interpretive uncertainty that would arise in the absence of such provisions as to whether the liberal freedoms protect the right to form a political party. Second, they are credible commitments to political elites as part of post-authoritarian or post-conflict transitions that they will be able to pursue their interests politically. Third, they serve as focal points for political mobilization, specifically to defend against attempts to undermine opposition parties.

Second, constitutions can go beyond creating a permissive legal environment for opposition political parties to institutionalize the opposition. The principal way for doing so is to create the Leader of the Opposition as a public office, which has a number of important effects. It creates an office holder, and grants powers to that official, as opposed to the opposition as a whole, which shifts the intra-opposition distribution of power away from individual members. The leader's power to grant political patronage, for example, in the form of committee memberships, provides incentives for opposition legislators to join and not defect from the opposition party. Conversely, through requirements that the leader hold office with the support of the opposition caucus, and the creation of a formal process for appointment and dismissal, the constitution can regularize that accountability relationship and create transaction costs to dismissal and create a default of incumbency. Overall, creating the office of leader can enhance the legislative coherence and effectiveness of opposition parties, therefore promote political competition.

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<sup>37</sup> South Africa Const. (1996), Art. 19

<sup>38</sup> e.g. Estonia Const. (1992), Art 12.

<sup>39</sup> Germany Const. (1949), Article 21(1).

The most well-developed constitutional model for the Leader of the Opposition comes from several constitutions Caribbean Commonwealth. They create a version of the confidence convention that normally applies to the Prime Minister and Cabinet.<sup>40</sup> The Leader of the Opposition must appear to command the confidence of majority of those members who do not support the government, or failing that, the single largest group of members who do not support the government. The Governor-General (the head of state, exercising the powers of the Queen) can dismiss the Leader of Opposition if he or she lacks this confidence. Moreover, there is a version of the responsible government convention, for those powers of the Governor-General exercised on the advice of Leader of Opposition, which relate to appointments to electoral and/or boundary commissions.<sup>41</sup> An intermediate position is to refer to the Leader of the Opposition as a member of a nominating or advisory body, without defining it, meaning that the constitution presupposes their existence and function, as is the case in South Asia;<sup>42</sup> or to require that the office be created in another legal instrument, as in South Africa.<sup>43</sup>

The contrast to earlier Commonwealth constitutions – for example, those of Australia, Canada and New Zealand – is striking. The Leader of Opposition in those documents is left to constitutional convention. As Madhav Khosla argues, drawing on the Indian experience, in new democracies, codification is particularly important, because of the absence of shared background understandings among constitutional actors.<sup>44</sup> The audience, for Khosla, is the people who had never before lived under a system of constitutional self-rule. But another audience must also be politicians themselves who work the gears of the constitutional system, especially within the legislature itself. The provisions on the Leader of the Opposition serve as a coordinating device. Moreover, the extension of the confidence and responsible government conventions to the Leader of the Opposition goes well beyond what even constitutional convention provides in those systems or Westminster. One value of the extension of the confidence convention is that it declares that the Leader of the Opposition is an office holder in a system of competitive democracy. Another is that it helps to bring order and coherence to an opposition which might face the risk of being fragmented and chaotic, by clarifying the rules governing the selection of the Leader.

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<sup>40</sup> e.g. Barbados Const. (1966), Art. 74(2))

<sup>41</sup> e.g. Antigua and Barbuda Const. (1981), Art. 63(1)(c)).

<sup>42</sup> e.g. India Const. (1950), Art. 124A (constitutes a National Judicial Appointments Commission including two members nominated by a committee including the Leader of the Opposition); Nepal Const. (2015), Art. 284(1)(e); Sri Lanka Const. (1978) Art. 41Ac.

<sup>43</sup> South Africa Const. (1996), Art. 57(2)(d) (the rules and orders of the National Assembly must provide for the recognition of the leader of the largest opposition party in the Assembly as the Leader of the Opposition).

<sup>44</sup> Madhav Khosla, *India's Founding Moment: The Constitution of a Most Surprising Democracy* (Harvard University Press, 2020).

The Leader of the Opposition model of collective empowerment is pervasive in the Commonwealth. An alternative model – originating in European parliamentary democracies – is defining minorities by reference to a fraction (e.g. one-third, one-fourth). Most European parliamentary democracies, and democracies relying on European parliamentary models, refer to a fraction of the legislature instead of opposition parties *per se* as a corporate entity. The institutional recognition of parliamentary groups among opposition political groupings happens in rules of parliamentary procedure – for example, those of the *Bundestag*, which defines parliamentary groups as “associations of not less than five percent of the Members of the *Bundestag*, and their members shall belong to the same party or to parties which, on account of similar political aims, do not compete with each other in any *Land*.”<sup>45</sup>

But a notable exception can be found in the Tunisian constitution, adopted in 2014, which is semi-presidential.<sup>46</sup> It refers to a singular “opposition”, as a collective body, and grants it a formal constitutional status, by declaring it to be “an essential component of the Assembly of the Representatives of the People” (Tunisia’s unicameral legislature). It contains a general grant of constitutional power on the opposition for powers to “enable it to undertake its parliamentary duties”, including – but crucially, not limited to “adequate and effective representation” in the Assembly’s committees (which may extend beyond merely proportionate representation) with responsibility for policy development and considering bills. With respect to oversight, it specifically assigns the chair of the Finance Committee (an oversight body, analogous to the Public Accounts Committee in Commonwealth parliamentary systems) and “has the right to establish and head a committee of enquiry annually”.

The origin of these provisions can be traced to the Tunisian National Dialogue Quartet, an informal coalition of organized labour, industry, civil liberties and legal organizations that served as mediators among Tunisian political forces in 2013.<sup>47</sup> The trigger for the creation of the Quartet was the breakdown of the constitutional process in the transitional National Assembly – with the governing coalition led by the Islamist party Ennahda on one side, and left wing and secular parties on the other, with the latter distrusting the former’s commitment to multiparty, competitive politics. The opposition also encompassed extra-parliamentary allies, including regime remnants that had not been part of the political process before then (who formed the Nidaa Tounes party). The Quartet provided a framework within which the old regime elements and Ennahda, for the first time, accepted each other political opponents, not enemies. The

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<sup>45</sup> Rules of Procedure of the German Bundestag, Rule 10(1) (official English translation).

<sup>46</sup> Tunisia Const. (2014), Art. 60.

<sup>47</sup> Rikke Hostriup Naugbølle, Amine Ghali, Hèla Yousfi, Mohamed Liman and Nina Mollerup, *Tunisia’s 2013 National Dialogue: Political Crisis Management* (Berghoff Foundation, February 2017).

Quartet revived the constitutional process, with Article 60 as an important outcome that constitutionalized the political practice which emerged during that process.

### 3. Oversight powers

Opposition oversight powers fall into four clusters: the powers to (a) convene the legislature and constitute a quorum; and once the legislature has been convened (b) pose oral and verbal questions and trigger interpellations, in plenary; (c) oversee the executive in standing committees or special commissions of inquiry; and (d) propose motions of non-confidence or censure. Oversight rights take the form of what Adrian Vermeule has called “submajority rules” which he defines as voting rules that grant “a voting minority the power the affirmative power to change the status quo”.<sup>48</sup> As Vermeule observes:

institutions use submajority rules only for preliminary and procedural questions, and to set agendas – for voting on the question of which issues are to come up for a substantive vote by a simple or special majorities.<sup>49</sup>

In the course of explaining the submajoritarian roll-call power in Congress, Vermeule makes a more general point “[b]y enlisting the interests of future legislative minorities, constitutional framers force accountability upon future legislative majorities, in the higher interests of the electoral or popular majorities whose agents the legislators are”.<sup>50</sup> As I will argue below, opposition rights in relation to agenda-setting also are submajority rules.

The *formal structure, scope and rationale* of submajority rules in relation to oversight and agenda-setting are very different from the kinds of minority rights that have dominated the constitutional design literature: those found in consociational power-sharing systems. The latter consists of mutual vetoes and super-majority rules, and in form are negative limitations on positive powers of decision by majorities – i.e. despite the wishes of the majority. The result is no decision at all. By contrast sub-majority rules grants a minority the power of positive decision – again, in the face of the objections of the majority – a much more expansive power. But their scope is limited to oversight and agenda-setting. The power of ultimate decision on substantive policy issues rests firmly with majorities, usually simple majorities. Minority rights under power-sharing, in contrast, apply to ultimate decisions, which they can block. These differences in form and scope fit differences in rationale. Minority rights under power-sharing enable minorities to

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<sup>48</sup> Adrian Vermeule, “Submajority Rules: Forcing Accountability Upon Majorities” (2005) 13 *Journal of Political Philosophy* 74 at 74.

<sup>49</sup> Ibid.

<sup>50</sup> Vermeule at 85.

protect their vital interests by preventing some decisions, and where possible, to bargain with majorities toward mutually acceptable outcomes. The political constituency appealed to by the minority is distinct from that of the majority; the two do not compete with each other for public support, and instead compete within their segments of the public. Opposition rights are part of a system of political competition, in which the opposition contends for power and to replace the government in the next election. Oversight and agenda-setting powers support a system of political competition over an overlapping pool of voters.

The exercise of oversight powers requires that the legislature be in session. The easiest way for the government to avoid being held accountable by the opposition through the exercise of such powers is to govern without convening the legislature. Accordingly, opposition parties should have the constitutional power to the legislature for an extraordinary or special session, which must be done within a specified number of days or without delay. Examples of such constitutional provisions are found mostly outside the Commonwealth, which empower a minority fraction of the legislature, in European parliamentary democracies<sup>51</sup> and non-European countries with constitutional systems modeled on them.<sup>52</sup> A corollary of the power of opposition parties to convene the legislature is for a minority to also constitute a quorum, as in Austria.<sup>53</sup> The rationale is to disable the government from frustrating the opposition's power to convene the legislature by simply not showing up. To be clear, while a minority can convene the legislature and constitute a quorum, it cannot take control of the legislature and enact legislation (which requires a higher quorum). But it can exercise the oversight powers below, creating a debate and focusing public attention by its very presence. The implicit premise is that the government will not wish to yield the parliamentary forum to the opposition, because of the platform it affords them.

Once the legislature is in session with a sufficient quorum, the opposition can wield oversight powers exercised in plenary and in committee. In plenary, the opposition should have

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<sup>51</sup> e.g. Albania Const. (1998), Art. 74(2); Armenia Const. (1995), Art. 100(1); Austria Const. (1920), Art. 28(2); Bulgaria Const. (1991), Art. 78(2); Czech Republic Const. (1993), Art. 34(3); Estonia Const. (1992), Art. 68; Georgia Const. (1995), Art. 44(2); Germany, Art. 39(3); Italy Const. (1947), Art. 62; Kosovo Const. (2008), Art. 68(2); Latvia Const. 1922, Art. 22; Lithuania Const. (1992), Art. 64; Luxembourg Const. (1868), Art. 72(2); Moldova Const. (1994), Art. 67(2); Montenegro Const. (2007), Art. 90; Romania Const. (1991), Art. 66(2); Serbia Const. (2006) Art. 106; Slovakia Const. (1992), Art. 82(4); Slovenia Const. (1991), Art. 85; Ukraine Const. (1996) Art. 83.

<sup>52</sup> e.g. Cambodia Const. (1993), Art. 83; Central African Republic Const. (2016), Art. 64; Japan Const. (1946) Art. 53; Mongolia Const. (1992), Art. 27(3); Mozambique Const. (2004), Art. 186; Myanmar Const. (2008), Art. 84; Niger Const. (2010), Art. 92; Somalia Const. (2012), Art. 66(4)(c); Switzerland Const. (1999), Art. 151(2); Tunisia Const. (2014), Art. 57; Taiwan Const. (1947), Art. 30(1)(4).

<sup>53</sup> Austria Const. (1920), Art. 31 (1/3 of legislators constitute quorum).

the right to pose written and verbal questions.<sup>54</sup> An oft-observed contrast between parliamentary and semi-presidential systems, on the one hand, and presidential systems, on the other, is the institution of question period or question time. During a regularly scheduled time (in some systems, several days a week), the opposition may pose verbal questions to the government. These arrangements can be constitutionalized in the form of an opposition right, as in France.<sup>55</sup> The questions may concern public administration of existing programs, legislative proposals or emerging issues of public policy that the government has not yet addressed. They often seek information. The government must answer these questions, and in the course of doing so, provide the information requested defend its policies and decisions. Verbal questions provide an opportunity for the opposition to criticize the government in a highly visible forum. The opposition should also be able to pose written questions, which are largely confined to factual inquiries, and have a forensic purpose mostly relating to the administration of government programs – and which can then feed into verbal questions.

Interpellations take questions a step further. They are “a formal request for information or clarification of the government’s policy”,<sup>56</sup> and a practice that arose in European parliamentary democracies that has diffused globally outside the Commonwealth. For example, in Finland, twenty legislators may address an interpellation to the government, which the government must respond to in plenary within 15 days.<sup>57</sup> The analog of an interpellation within Westminster systems is a special debate initiated by the opposition and/or an opposition motion and on a question of government policy. Both kinds of constitutional practices provide the opposition the power to launch a focused debate on a specific topic, in plenary. In this sense, they are akin to verbal questions. In addition, the interpellation or opposition motion is often followed by a vote. Why would the opposition exercise a right to initiate process that will culminate in a vote that it will certainly lose? The value of this institutional practice is that it provides a platform for a very visible, targeted, and prolonged form of accountability that requires the government to provide an extended, public defence of its position in the face of repeated opposition attack. In addition, as I argue below, both questions and interpellation are agenda-setting devices for the opposition that allow it to put forth a counter-vision to the government.

Votes on interpellation and opposition motions are closely related to motions of censure and non-confidence, which a fraction of legislators have the power to bring. Although the two

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<sup>54</sup> *Global Parliamentary Report 2017* (Inter-Parliamentary Union and United Nations Development Program, 2017), ch. 3.

<sup>55</sup> France Const. 1958, Art. 48.

<sup>56</sup> Hinonori Yamamoto, *Tools for parliamentary oversight: A comparative study of 88 parliaments* (Inter-Parliamentary Union, 2007).

<sup>57</sup> Finland Const. (1999), Art. 43.



are sometimes synonymous, they can also be conceptually distinct. A vote of non-confidence is taken in the government as a whole, and if passed, requires the government to resign (most often followed by the dissolution of the legislature) – as is the case, for example, in Japan.<sup>58</sup> In Spain, the same procedure is referred to as a motion of censure.<sup>59</sup> The Constitution of Tunisia, by contrast, differentiates between votes of non-confidence and censure, with the latter reflecting the disapproval of legislature in the government without requiring its resignation.<sup>60</sup> Again, the point of the power to bring such motions is not to prevail, but rather to empower the opposition to shine a spotlight on the government.

Finally, Parliamentary committees allow the opposition to delve deeper into public administration. Opposition rights can take two forms. First, in the European parliamentary tradition, many constitutions empower a minority fraction of the legislature to appoint special parliamentary committees (variously termed committees of inquiry, special commissions, commissions of inquiry, and investigative commissions). For example, in Germany one-quarter of members of the *Bundestag* (the lower chamber of the federal parliament) can require the formation of a parliamentary committee of inquiry.<sup>61</sup> With the power to hold public hearings and to wield investigative powers to call witnesses and demand documentation, such committees can provide an important forum for opposition parties to hold government accountable. To be sure, such committees are multi-party bodies, and therefore will have government members (and likely government majorities). In that case, the right of the opposition to file a separate, dissenting report is an important corollary of the power to strike such a committee. Governments may also attempt to sabotage such committees, by exercising their legislative majorities to broaden the committee’s agenda, over the objections of the opposition. The German Constitutional Court has responded to this risk by creating constitutional framework to the power of legislative majorities to add new questions, to those circumstances where “such questions are necessary to form a more comprehensive – and therefore more accurate – account of the supposed impropriety or problem under investigation” and are “related to the subject matter of the original request and leave it essentially unchanged”.<sup>62</sup>

In the Commonwealth parliamentary tradition, the mechanism for opposition-directed investigation of the government is a standing Public Accounts Committee. These committees

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<sup>58</sup> Japan Const. (1946), Art. 69.

<sup>59</sup> Spain Const. (1978), Art. 114.

<sup>60</sup> Tunisia Const. (2014), Art. 97.

<sup>61</sup> Germany Const. (1949), Art. 44(1).

<sup>62</sup> BVerfGE 49, 70—*Untersuchungsausschuss* (Committee of Inquiry) at 88, translated in Christian Bumke & Andreas Voßkuhle, *German Constitutional Law: Introduction, Cases and Principles* (Oxford University Press, 2019) at para. 2094.

have a broad mandate to review government program expenditures, for efficiency and effectiveness. Combined with technical support from audit institutions, these committees can shed a harsh light on government incompetence and corruption. In many Westminster style parliamentary democracies, the opposition chairs these committees, as a matter of constitutional convention. Some Commonwealth constitutions have constitutionalized this convention.<sup>63</sup> While David Fontana suggests that this constitutional practice is an example of “government in opposition”, which he defines as “granting losing parties not just the right to dissent from and obstruct the efforts of the winning political party, but also to exercise the power to govern as well”, this is a category mistake, since the Public Accounts Committee is an oversight, not a policy and legislative committee.<sup>64</sup>

### 3. Agenda-setting powers

In parliamentary systems, the power to propose and pass legislation is a key tool for governments to deliver, communicate, and define a governing agenda. In order to present a credible governing alternative, opposition parties too need mechanisms to define a counter-agenda to the government. While election campaigns – with contending party platforms – are an important vehicle for doing so, the opposition should also be granted tools to communicate its agenda in between elections, in the legislative process. In principle, one important means for the opposition to define and communicate its vision to the public could be the right to propose legislation of its own. Such legislation, in very concrete terms, allows the opposition to illustrate how it would govern – both in terms of putting issues on the political agenda and spelling out its approach to them. The ensuing legislative debate, in which the government would presumably oppose the opposition’s legislation, becomes a clarifying clash between competing agendas. In the almost certain event that the opposition’s legislation is not passed, the opposition could use the legislative process to mobilize political support for the next election. Alternatively, another important opposition right would be to propose amendments to government bills, which would also be nearly certain to fail, but serve as platforms for agenda-setting.

It is therefore striking that very few constitutions confer on the opposition the power to propose or amend legislation. A rare example is Austria, where one-third of members of the Federal Council (the lower chamber of the national legislature) can propose legislation.<sup>65</sup> The interesting question is why this power is not more widely constitutionalized. For an answer, we should turn to 19<sup>th</sup> century British Parliamentary history. As Gary Cox has described in his

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<sup>63</sup> e.g. Trinidad and Tobago Const. (1976), Art. 119(2).

<sup>64</sup> David Fontana, “Government in Opposition” (2009) 119 *Yale Law Journal* 548 at 550 and 572-3. For similar criticism, see Webber at 373.

<sup>65</sup> Austria Const. (1920), Art. 41(1).

authoritative study of the rise of cabinet government in Westminster, at the outset of the 19<sup>th</sup> century, private members – i.e. who were outside the cabinet – had expansive powers of legislative initiative alongside the government.<sup>66</sup> Toward the end of the 19<sup>th</sup> century, the government was firmly in control of the legislative agenda, with the opposition having relatively minimal opportunities to introduce legislation.

The rise of the government-controlled Parliament was a profound change in British constitutional practice, and the question is why this occurred. For Cox, the story has the following elements: (a) the “erosion of the powers of individual MPs in the 1830s, 1840s, and 1850s”, with the consequence that “[t]he private MP had become insignificant in the determination of policy ... by the 1860s” and the legislative agenda was firmly in the hands of the cabinet; (b) a shift in the behavior of electors, to “using their votes to determine what did matter: party control of the executive”; and (c) the growth of party discipline, since “[a]s the ministry became more important, more men wished to belong to it, and Premiers could use the carrot of advancement and the stick of non-advancement to enforce discipline.”<sup>67</sup> The cause of (a) was (d) “the increased demand by MPs for legislative time ... driven by the growth of constituencies”, which precipitated a shift from patronage to policy to retain the support of constituents and in turn created a tragedy of the commons with respect to the distribution of scarce legislative time that was resolved by the cabinet consolidating power over agenda control.<sup>68</sup>

However, As Andrew Eggers and Arthur Spirling have demonstrated, Cox’s story is not complete, because it principally focuses on the strategies and incentives of the government, not the emerging opposition. They make two key findings. First, the growth of the agenda-setting power of the government culminated in Lord Balfour’s “railway timetable” reforms of 1902, which came after opposition MPs largely lost the power of legislative initiative.<sup>69</sup> Prior to the railway timetable, the opposition had shifted its activities to putting questions to ministers at any time in Parliamentary debates. The railway timetable sharply reduced the time for, and the number of questions, which had been previously unlimited; it also confined private business to the end of the session each day. Eggers and Stirling show that the opposition acquiesced in these changes, as part of an “institutional quid pro quo in which the government strengthened its grip on procedural control in exchange for giving the opposition more and extensive opportunities to

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<sup>66</sup> Gary W. Cox, *The Efficient Secret: The Cabinet and the development of political parties in Victorian England* (Cambridge University Press, 1987).

<sup>67</sup> Cox at 136, 136 and 65.

<sup>68</sup> Cox at 59.

<sup>69</sup> Andrew C. Eggers and Arthur Spirling, “Ministerial Responsiveness in Westminster Systems: Institutional Choices and House of Commons Debate, 1832-1915” (2014) 58 *American Journal of Political Science* 873.

confront ministers”.<sup>70</sup> On their account, opposition traded greater oversight powers in exchange for diminished agenda-setting powers. Second, Eggers and Spirling attribute the rise of the “ ‘Shadow Cabinet’ – the group of frontbench spokespersons from the official opposition [that] forms the executive when the party currently in opposition next enters the government” as “a government in waiting” that “closed the gap in terms of agenda-setting in their partisan competition with Cabinet”.<sup>71</sup>

I offer a different interpretation of these historical developments. In Westminster parliamentary practice, the opposition traded what had historically been seen only as oversight powers for the traditional agenda-setting power of legislative initiative. But in addition, through the advent of question period and the Shadow Cabinet, certain oversight powers – specifically, the power to ask verbal questions – were broadened in purpose to become agenda-setting powers for the opposition as well. The Shadow Cabinet, through sharp, focused questions in a time-limited format with high visibility, does not just scrutinize the government. In the course of challenging the government, it has the opportunity to also present a counter-agenda – much as opposing counsel in legal proceedings do through cross-examination. A parallel argument can be made for interpellation and opposition motions and debates, which also serve dual oversight and agenda-setting functions. The implication for comparative constitutional law is that the value of these rights should be understood in such terms.

However, the legislative process *is* nonetheless important to agenda-setting by the opposition. The mechanism is not the opposition’s power of legislative initiative, but rather, the right of the opposition to fully participate in the legislative process for *government* legislation. In the course of opposing government in legislative debates, the opposition does not merely oppose the government’s agenda. The legislative process also affords the opposition to advance a counter-agenda as a government in waiting. For example, it could describe the legislation it would have enacted. The legislative process provides a functional substitute for the opposition power of legislative initiative. Moreover, because that process provides a framework for a structured debate over a government bill that is likely to pass, the opposition’s platform can attract much more scrutiny.

The multi-stage legislative process is particularly important as an agenda-setting device for the opposition. In this respect, I part company with Jeremy Waldron, in his account of the

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<sup>70</sup> Eggers and Spirling, “Ministerial Responsiveness in Westminster Systems” at 876,

<sup>71</sup> Andrew C. Eggers and Arthur Spirling, “The Shadow Cabinet in Westminster Systems: Modeling Opposition Agenda Setting in the House of Commons, 1832-1915” (2016) 48 *British Journal of Political Science* 343.

principles of “legislative due process”.<sup>72</sup> One of Waldron’s principles is “the duty of responsiveness to deliberation”, which he explains as follows:

The legislature is a place for debate, not just display, and as recent theories of “deliberative democracy” have emphasized, debate requires an openness to others’ views and a willingness to be persuaded. It is therefore important that the views voiced in the legislature not be held as frozen positions, with no possibility of change or compromise. Opinions must be held as opinions, and therefore open to elaboration, argument, correction and modification.<sup>73</sup>

Although Waldron does not directly address the multi-stage nature of the legislative process, he might argue that the debate of a legislative proposal, in a number of steps, including in committee, might provide a better institutional framework for deliberation than a single stage legislative process. By contrast, an agenda-setting account of the stages of the legislative process would justify it principally as an opportunity to criticize the government’s views and to offer a different vision.

Consider the example of Poland. Wojciech Sadurski provides a chilling account of the numerous ways in which Poland’s governing Law and Justice Party (PiS) has used legislative fast-tracking to sideline opposition parties in the enactment of laws whereby the PiS undermined the independence of the judiciary.<sup>74</sup> Under the fast-track procedure, bills do not go through the committee stage, which involves public consultation, expert testimony, and committee reports including dissenting reports by the opposition. In addition, within the fast-track procedure the PiS went to extra-ordinary lengths to deny the opposition the opportunity to meaningfully participate in the legislative process:

The frantic pace at which some of the most important legislative acts were forced through parliamentary commissions and in the plenary debates of the Sejm [Poland’s lower house] and Senate silenced the opposition through devices such as gag rules during ‘deliberations’, placing new items on the agenda without any notice and speeding up the deliberation, often late into the night or early morning ... with the speed not being justified by any substantive urgency to the proposals. Occasionally, the chairman of the parliamentary commission ... when subjecting the opposition’s proposed amendments to vote, would not allow the opposition MPs to explain what the amendments were about ... The silencing was literal: it

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<sup>72</sup> Waldron, ch. 7.

<sup>73</sup> Waldron at 160.

<sup>74</sup> Sadurski at 132 to 135.

was achieved by the simple method of turning the microphone off. ... even the MPs representing the ruling party limited themselves to the most perfunctory statements ... Requests by opposition members for intervals in the committee meetings in order to have time to get acquainted with the newly submitted drafts were summarily refused. ... the voice of the opposition in the Sejm was reduced [through]: the limiting of speeches to one minute ... the method of voting *en bloc* on amendments where all amendments were bundled together, not on the basis of their subject matter, but on the basis of which party proposed them (in order to make it easier for the MPs for the ruling party to know which amendments to reject); failure to provide enough time to read some proposed amendments ...<sup>75</sup>

So here is the question. What was the PiS so afraid of, that led it to brazenly abuse the legislative process? It commanded a legislative majority, so victory was guaranteed. Moreover, with tight party discipline, deliberation was a near impossibility – notwithstanding Sadurski’s principled hope that the PiS should have treated the opposition as “vehicles of possibly helpful amendments to legislative drafts”.<sup>76</sup> The answer must be that a proper legislative process would have allowed the opposition to criticize the government’s proposals and set out a counter-vision of judicial independence and the rule of law, which it could have used to mobilize public support against the legislation during its enactment, and to build upon in the lead up to the next election. Legislative due process enhances political competition, which explains attempts to subvert it.

#### 4. Enforcement mechanisms

Opposition rights can be enforced by two overlapping mechanisms: speakers of the legislature or courts. The constitutional entrenchment of the office of the speaker is pervasive, – although the terminology varies, from Speaker in the Commonwealth,<sup>77</sup> and President or Chairman in European-style parliamentary and semi-presidential systems – which underlines its importance.<sup>78</sup> The oldest office is that of the Speaker of the House of Commons at Westminster, which dates from 1258, although the modern version of the office dates from 1728.<sup>79</sup> There is an intimate relationship between the Speaker and opposition rights. The Speaker presides over the House of Commons and administers its rules. The opposition rights that are exercised in plenary – the power to pose verbal and written questions, opposition debates and motions, motions of non-confidence, the various stages of the legislative process – must be enforced by

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<sup>75</sup> Sadurski at 133 to 134.

<sup>76</sup> Sadurski at 132.

<sup>77</sup> e.g. Australia Const. (1900), Art. 35.

<sup>78</sup> e.g. Armenia Const. (1995), Art. 104.

<sup>79</sup> Philip Laundy, “The Speaker of the House of Commons” (1960) 14 *Parliamentary Affairs* 72.

the Speaker. For opposition political parties, the first port of call for the protection of their rights is the Speaker.

In other constitutional systems, the remit of the speaker extends further, to the convening of the legislature by the opposition, to enable it to function when there is a quorum, and to enforce the right of the opposition to conduct interpellations. Moreover, as we shall see in Section D, the role of the speaker in parliaments extends beyond enforcing opposition rights, be they in rules of parliamentary procedure or constitutions, to interpreting them when their meaning is contested. These interpretive debates can be fraught affairs, and pit political parties against each other. Moreover, in the course of interpreting these rules, speakers must adjudicate these disputes and rule upon them, with these rulings having binding effect upon the parties.

In this sense, there is conceptual overlap between the role of a speaker and that of a constitutional court judge, in terms of subject-matter, role and powers. This helps to explain two features of the Speaker in Westminster, which are impartiality and non-partisanship. The latter is the structural support for the former, analogous to how judicial independence protects judicial impartiality. These institutional features flow from the Speaker's obligation to protect opposition rights. Philip Laundy puts it well:

The prestige attaching to the office of Speaker of the House of Commons is hardly less exalted than that of the Sovereign herself. It is such as to sustain the authority even of an inferior incumbent, and it is no accident that this should be so. The independence of the chair is the guarantee of the rights of minorities, and it is considered imperative that the high standards of fairness and impartiality which have come to be associated with the speakership of the House of Commons should be perpetually emphasized.<sup>80</sup>

While Laundy refers to the "minority" here, he means the *parliamentary* minority – i.e., the opposition. As Laundy explains, the imperative of impartiality has led to the development of traditions – I would even term them constitutional conventions – "which have removed the office from the arena of partisanship so completely that today the Speaker is not only impartial but he can be seen to be impartial".<sup>81</sup> For example, Speakers must sever all ties with their political parties, and cannot represent their constituents.

The politicization of the office of the speaker is one tool in the populist erosion of opposition rights. In Poland, for example, the Standing Orders of the Sejm require that

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<sup>80</sup> Laundy at 72.

<sup>81</sup> Laundy at 73.

amendments to the criminal code (as well as to other codes, such as the civil, or election code) be discussed no earlier than 14 days after being introduced. The goal behind this provision is to provide time to the opposition to cast a spotlight on major legislative changes, in advance of a debate in the Sejm. In 2019, the Speaker of the Sejm declined to apply these rules to amendments to the criminal code regarding sexual abuse of children, which were passed a mere two days after being introduced.<sup>82</sup> As we shall see, the politicization of the office of speakers in India and South Africa has led opposition parties to take disputes that originated within legislative chambers to the courts.

Constitutional courts are the other enforcement mechanism for opposition rights. The mechanism is the power of a parliamentary minority to refer constitutional questions to the constitutional court, which is widespread in European parliamentary democracies,<sup>83</sup> but also in countries heavily influenced by European constitutional developments, especially in Francophone and Lusophone Africa.<sup>84</sup> The origins of this constitutional institution can be found in Hans Kelsen's original proposal for the creation of a constitutional court, in 1929:<sup>85</sup>

As far as the contestation of statutes, in particular, is concerned, it would be of the greatest importance to provide that opportunity also to a minority – however qualified – of the parliament that enacted the unconstitutional statute. This [sic] all the more reason that constitutional adjudication in parliamentary democracies – as will have to be established later on – must necessarily put itself into the service of the protection of minorities.

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<sup>82</sup> Barbara Grabowska-Moroz, Katarzyna Łakomicz & Michał Ziółkowski, "The History of the 48-Hour Lawsuit: Democratic Backsliding, Academic Freedom, and the Legislative Process in Poland", posted at: <https://blog-iacl-aidc.org/2019-posts/2019/6/27/the-history-of-the-48-hour-lawsuit-democratic-backsliding-academic-freedom-and-the-legislative-process-in-poland> (28 June 2019).

<sup>83</sup> E.g. Albania Const. (1998), Art. 134(1)(c); Armenia Const. (1995), Art. 169(1)2; Austria Const. (1920), Art. 140(1)2; Bulgaria Const. (1991), Art. 150(1); France Const. (1958), Art. 54; Germany Const. (1949), Art. 93(1)2; Hungary Const. (2011), Art. 24(2)e; Spain Const. (1978), Art. 162(1)a.

<sup>84</sup> E.g. Angola Const. (2010), Art. 228(2); Burkina Faso Const. (2015), Art. 157; Central African Republic Const. (2016), Art. 93; Congo Const. (2015), Art. 178; Congo (DRC) Const. (2005), Art. 139(4); Côte d'Ivoire Const. (2016), Art. 108; Gabon Const. (2011), Art. 85; Madagascar Const. (2010), Art. 118; Mali Const. (1992), Art. 88; Mauritania Const. (2012), Art. 86; Mozambique Const. (2004), Art. 245(2)(c); Niger Const. (2010), Art. 110; Sao Tome and Principe Const., Arts. 145(3) and 147(2)(e); Senegal Const. (2001), Art. 74.

<sup>85</sup> Hans Kelsen, "Wesen und Entwicklung der Staatsgerichtsbarkeit" (1929) 5 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 30. I rely on the translation appearing as "Kelsen on the nature and development of constitutional adjudication" in Lars Vinx, *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (Cambridge University Press, 2015) 22 at 66.



What kind of a minority is Kelsen referring to here – a parliamentary minority that is also a permanent minority in the political community, or a temporary minority that contends for power in competition with the current governing party as an opposition party?

The answer, I would argue, can be found in Kelsen’s distinction in the same essay between two kinds of unconstitutionality – formal and material. A constitution’s formal requirements consist of the “norms that concern the organs and the procedure of legislation”, whereas its material requirements consist of “a catalogue of basic rights and rights of freedom”, where “[t]he primary, though perhaps not the exclusive purpose of such a catalogue is to put up basic principles, guidelines, and limitations for the content of statutes to be enacted in the future”.<sup>86</sup> For Kelsen, the reason for establishing a constitutional court is to enable a minority to protect these material elements “to prevent a dictatorship of the majority”.<sup>87</sup> To be sure, opposition political parties have used the power to refer legislation to constitutional courts to check majority power by deploying the material constitution. As Alec Stone-Sweet demonstrated, European constitutional courts have transformed the practice of parliamentary democracy on the continent, since “referral instantaneously redistributes political initiative in the opposition’s favour and reduces the influence of the government and the parliamentary majority over legislative outcomes”.<sup>88</sup>

But many of the opposition rights we have examined are part of the constitution’s formal requirements, since they constitute the elements of legislative due process. And so the role of the constitutional court, in this context, is quite different. It is not to enable an opposition party to veto and shape the outcomes of the policy process, per Stone-Sweet. Rather, it is to protect the opposition’s ability to deploy opposition rights to hold the government accountable, and to serve as the government-in-waiting. This interpretation of Kelsen’s argument for the creation of constitutional courts harmonizes his writings on constitutional law with work on the theory of parliamentary democracy, in which he argued that “[m]odern democracy virtually rests on political parties” and “a democratic state is necessarily and unavoidably a multiparty state”.<sup>89</sup>

#### **D. Opposition rights in constitutional interpretation**

I now to turn to four examples of how courts have interpreted opposition rights, in constitutional challenges to: (a) the rules governing the creation of opposition teams in Germany;

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<sup>86</sup> Kelsen at 26.

<sup>87</sup> Kelsen at 72.

<sup>88</sup> Alec Stone-Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford, 2000) at 198.

<sup>89</sup> Hans Kelsen, *The Essence and Value of Democracy*, Nadia Urbinati and Carlo Accetti, eds. (Rowman and Littlefield, 2013), ch. 2.

(b) the prorogation of Parliament in the United Kingdom to impede the exercise of oversight powers; (c) attempts to thwart the opposition's impeachment of then-President Jacob Zuma in South Africa, also an oversight power; and (d) the use of the money bill procedure to circumvent the upper chamber to enact a biometric identification system in India, thereby undermining opposition agenda-setting powers. The constitutional contexts in which these cases have arisen are very different. In Germany and South Africa, numerous constitutional provisions accord constitutional status on, and expressly confer rights, on opposition parties – in South Africa, following the Westminster model of an official opposition, whereas in Germany, following the continental model of parliamentary fractions. In India and the United Kingdom, by contrast, the constitutional anchors are either found in rules of legislative procedure or are implied by elements of the separation of powers (e.g. bicameralism). Nonetheless, I argue that these cases should be viewed as key elements of a comparative jurisprudence of opposition rights.

### 1. Opposition Teams in Germany

Constitutions which empower parliamentary minorities to refer constitutional questions to the constitutional court vary widely in the fraction of legislators required to invoke this power, ranging from one-tenth to one-third. While France and Spain take a different approach, defining fixed numbers of legislators – 60 Members of the French National Assembly (currently less than one-ninth) and 50 Members of Congress (one-seventh) – they nonetheless fit this pattern. The conferral of the power of constitutional conferral on a fixed number or fraction of legislators distributes access to the enforcement mechanism for opposition rights to opposition parties above the requisite threshold, while denying it to those which fall below it.

In 2016, the German Federal Constitutional Court (FCC) dealt with a constitutional challenge to the various fractions found in the *Grundgesetz*, brought by Die Linke, a left-wing political party.<sup>90</sup> After the 2013 elections to the *Bundestag*, the Christian Democratic Party/Christian Social Union (CDU/CSU) and the Social Democratic Party (SPD) formed a grand coalition, and controlled 503 seats out of a total of 630. The remaining 127 seats were controlled by two opposition parties, The Left (Die Linke) and the Green Party. Under the *Grundgesetz*, the threshold for invoking a series of opposition rights is set at one-third (requiring the President to convene the *Bundestag*, Article 39(3)) and one-quarter (e.g. referrals to the European Court of Justice, Article 23(1); creating committees of inquiry, Articles 44(1) and 45a(2); and referrals to the Federal Constitutional Court, Article 93(1)2). Because Die Linke and the Green Party together amounted to approximately 20 percent of the *Bundestag*, they could not invoke any of these opposition rights. In direct response to this situation, the Left proposed a series of constitutional

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<sup>90</sup> 2 BvE 4/14 (*Die Linke*) (official English translation).

amendments that would have granted these rights to the parliamentary groups that did not support the government, which was opposed by the coalition government and did not pass. Instead, the government amended the *Bundestag's* rules of procedure to enable 120 members (a threshold met by the Die Linke and the Green Party together) to exercise the powers to require the President or convene the *Bundestag*, to refer matters to the European Court of Justice, and to create committees of inquiry, for the duration of the parliamentary session (i.e. until the next election).<sup>91</sup> The right to refer constitutional questions to the FCC was excluded from this rule change.

Die Linke brought a case against the *Bundestag* as an institution, arguing that it had acted unconstitutionally by not passing the proposed constitutional amendment, to ensure that the opposition rights in the *Grundgesetz* remained effective in the political context of the grand coalition. Die Linke's claim was premised on the existence of a positive constitutional duty to adopt specific constitutional amendments to give effect the constitutional principle of effective opposition, which has been recognized by the FCC in its previous jurisprudence. The FCC rejected this argument, on the basis that the form of the opposition rights in the *Grundgesetz* consisted of rights conferred on parliamentary minorities (i.e. defined quantitatively), not rights conferred on parliamentary opposition groups or even on the opposition as a corporate entity. Such rights, it followed, could be exercised by an *ad hoc* coalition of opposition and government legislators:

parliamentary minority rights, which are tied to quorums can be exercised by any minority that is formed in a given situation – without regard to its composition or its formation and irrespective of the party of parliamentary group membership of the participating members of Parliament.<sup>92</sup>

So while the FCC accepted the constitutional principle of effective opposition, it conditioned its interpretation of that principle on the existing structure of the German constitution, and thereby avoided the question of whether there could be a constitutional duty to amend the constitution. The question is why the FCC reached this conclusion.

The answer comes from the next part of the FCC's ruling, where it held that the proposed constitutional amendments could not be adopted, because of Article 38(1). In its previous case-law, the FCC has interpreted Article 38(1) to protect the equality of the members of the *Bundestag*, with the consequence that it would be unconstitutional to exclude government legislators from exercising the rights of parliamentary minorities. But of course, Article 38(1) does not apply to constitutional amendments. So the FCC must have reasoned that the proposed

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<sup>91</sup> Rule 126a.

<sup>92</sup> *Die Linke* at para. 102.

constitutional amendments would have been unconstitutional because of the combined effect of Articles 79 and 20, which prohibit constitutional amendments that are inconsistent with democracy.

Why would be it inconsistent with democracy to adopt the proposed constitutional amendments? The FCC turned to the drafting history of the *Grundgesetz*, where the Parliamentary Council “recognized both the issue of protecting the parliamentary minority, on the one hand, as well as the danger of the abuse of minority rights, on the other, which it could well recall from the days of the Weimar Republic”.<sup>93</sup> The FCC noted that the Parliamentary Council increased the proposed quorum under Article 44(1) from one-fifth to one-fourth, because the one-fifth quorum had enabled “the frequent abusive use of committees of inquiry during the Weimar period”.<sup>94</sup> The abuse of these powers was enabled by the “excessive fragmentation” of the Weimar legislature, the *Reichstag*, which “never held fewer than ten parties”.<sup>95</sup>

This reference to excessive fragmentation in the context of opposition rights brings to mind the FCC’s jurisprudence on electoral thresholds. In a series of cases, the FCC has held that, barring special circumstances, a 5% threshold is constitutional notwithstanding that it denies legislative seats to smaller parties.<sup>96</sup> As Donald Kommers and Russell Miller explain, in the FCC’s view, the role of the threshold is to incentivize the creation of larger parties “dedicated to the common good and possess popular mandates large enough to allow them to act” and to disincentivize the creation of “[s]plinter parties, often extreme in their views and too small to effectively produce legislation”.<sup>97</sup> The FCC has stated that setting the threshold too low could “lead to a fragmentation of political representation into many small groups, which can hinder or prevent the formation of a stable majority” – an objective of profound importance against the parliamentary chaos of Weimar.<sup>98</sup> In other words, one of the functions of electoral thresholds is to encourage the aggregation of political actors. By extension, electoral thresholds can promote political competition, by encouraging the development of larger, more coherent political parties, which can credibly contend for power.

Extending this argument, we can supply the missing justification in the FCC’s reasons: that thresholds for the exercise of opposition rights in the *Grundgesetz* can be understood as

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<sup>93</sup> *Die Linke* at para. 116.

<sup>94</sup> *Die Linke* at para. 117.

<sup>95</sup> *Die Linke* at para. 118.

<sup>96</sup> BVerfGE 6, 84 (1957) (*Bavarian Party Case*); BVerfGE 82, 322 (1990) (*National Unity Election Case*).

<sup>97</sup> Donald A. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 3d ed. (Duke University Press, 2012) at 254.

<sup>98</sup> BVerfGE 82, 322 at 388, translated in Bumke and Voßkuhle at para. 1931.

performing an analogous function as electoral thresholds. They provide the incentives for aggregation among a potentially fragmented opposition into parties of sufficient size that can exercise the opposition rights that enhance their ability to credibly compete for power. The *Rules of Procedure of the Bundestag* – which the FCC did not examine – play an important role here. In conjunction with the *Grundgesetz*, they create a two-tier system of opposition rights. The first tier of rights are assigned to a “parliamentary group”. As mentioned earlier, parties can qualify for status as a parliamentary group if they meet a threshold of 5 percent of the members of the Bundestag – identical to the electoral threshold.<sup>99</sup> Both Die Linke and the Greens met this threshold. The Rules confer a numerous opposition rights on parliamentary groups, especially in relation to committee. Parliamentary groups have a right to membership in the Council of Elders,<sup>100</sup> which in turn appoints committee chairpersons based on the relative strength of parliamentary groups.<sup>101</sup> On committees, parliamentary groups have the right to convene meetings,<sup>102</sup> to membership on subcommittees,<sup>103</sup> to veto changes to the committee’s agenda,<sup>104</sup> and to force a vote on agenda items.<sup>105</sup> Parliamentary groups can also demand a debate in the *Bundestag* on the second reading of a bill,<sup>106</sup> propose amendments on third reading,<sup>107</sup> and demand a roll call vote.<sup>108</sup> They can insist on a debate on the government’s reply to an interpellation,<sup>109</sup> and a matter of topical interest.<sup>110</sup> What the *Grundgesetz* does is to create a second tier of opposition rights subject to higher thresholds, to incentivize political groups to aggregate and contest for power and check their abuse.

## 2. Oversight: Convening the Legislature in the United Kingdom

Oversight powers cannot be exercised by the opposition unless the legislature is in session. The easiest way for the executive to avoid accountability is to not summon the legislature or to put it into recess. As discussed earlier, many constitutions therefore create an opposition right to convene the legislature to prevent the executive from gutting oversight powers. As with the power to make constitutional court referrals, this power is found in European parliamentary democracies and non-European countries with constitutional systems

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<sup>99</sup> Rule 10.

<sup>100</sup> Rules 6 and 55.

<sup>101</sup> Rules 12 and 55(2).

<sup>102</sup> Rule 60.

<sup>103</sup> Rule 55(3).

<sup>104</sup> Rule 61.

<sup>105</sup> Rule 64(2).

<sup>106</sup> Rule 81(1).

<sup>107</sup> Rule 85(1).

<sup>108</sup> Rule 52.

<sup>109</sup> Rule 101.

<sup>110</sup> Rule 106 and Annex 5, Article 1(c).

modeled on them. But as James Fowkes has explained, in the Commonwealth, a different approach is taken.<sup>111</sup> The power to put the legislature into recess is called prorogation. This power originated in the United Kingdom (UK), where the monarch has a prerogative power to prorogue Parliament, but as a matter of constitutional convention may only do so on the advice of the Prime Minister. The consequence of prorogation is the end of the current session of Parliament, which is later reconvened with a new legislative agenda. In many Commonwealth jurisdictions, the power to prorogue is subject to a limitation for how long the legislature can go without sitting. The most common time limits on prorogation are 6 months (e.g. India)<sup>112</sup> and 12 months (e.g. Australia).<sup>113</sup> In the United Kingdom (as well as in Canada and New Zealand), however, prorogation is *not* subject to any such condition, potentially raising the possibility of indefinite prorogation until the next election, unless the legislature must be convened to approve estimates, in order to authorize supply (the appropriation of the funds required by the government to meet its financial obligations and to implement programs already approved by Parliament). The question is whether this broad power is subject to judicial control, in order to enable oversight powers to be exercised.

In the *Prorogation Case*, the United Kingdom Supreme Court (UKSC) faced this precise issue head on, in a legal challenge to advice given by Prime Minister Boris Johnston to Queen Elizabeth to prorogue Parliament, commencing between 9 September 2019 and 12 September 2019 and continuing until 14 October 2019.<sup>114</sup> The case arose out of the Parliamentary saga surrounding Brexit. In *Miller*, the UKSC held that the Prime Minister could not give notice under Article 50 of the Treaty on European Union to withdraw from the European Union (EU) except if duly authorized by statute.<sup>115</sup> Parliament passed the requisite legislation, and Prime Minister Elizabeth May gave notice under Article 50 on 29 March 2017, starting a two-year clock that would lead to a “hard” Brexit on 29 March 2019 if there was no withdrawal agreement between the EU and the UK.<sup>116</sup> On 8 June 2017, a general election was held which yielded a Conservative minority government. This set the stage for a fundamental change in the dynamic in the House of Commons, where the government lost exclusive control over the legislative agenda.

The EU and the UK agreed to the terms of a withdrawal agreement on 25 November 2018, but the House of Commons rejected these terms on three separate occasions. On 20 March

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<sup>111</sup> James Fowkes, “Prorogation of the Legislative Body”, *Max Planck Encyclopedia of Comparative Constitutional Law*.

<sup>112</sup> India Const. (1950), Art. 85; also see Malaysia Const. (1957), Art. 55; Nepal Const. (2015), Art. 93; Singapore Const. (1965), Art. 65.

<sup>113</sup> Australia Const. (1900), Art. 6.

<sup>114</sup> *R (Miller) v. Prime Minister*, [2019] UKSC 41 (*Prorogation Case*).

<sup>115</sup> *R (Miller) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5.

<sup>116</sup> European Union (Notification of Withdrawal) Act 2017, c. 9.

2019, before the third and final unsuccessful vote on the withdrawal agreement, May asked the EU to extend the notification period past 29 March 2019, which the EU did until 12 April 2019. But Parliament then passed (on 8 April 2019) a statute opposed by the government which required the Prime Minister to seek a further extension to a date specified in a motion passed by the House of Commons (known as the Cooper-Letwin Act).<sup>117</sup> Pursuant to this new statute, the House of Commons passed a motion seeking an extension until 31 October 2019, which the EU granted. On 24 July 2019, May resigned as Prime Minister and was replaced by Boris Johnson. On 4 September 2019, Parliament adopted a second statute opposed by the government, that required the Prime Minister to seek a further extension to 31 January 2020 if Parliament had not approved the withdrawal agreement or to prevent a no deal Brexit on 31 October 2019.<sup>118</sup>

The core of the legal challenge turned on whether Johnson had acted unlawfully in advising the Queen to prorogue Parliament. As former UKSC Justice Lord Sumption has written, “prorogation was conceived as a way of disabling Parliament”, and in particular, to respond to Speaker John Bercow’s “inventive approach to procedure”, which had permitted the opposition to seize control of the legislative agenda from the government and propose legislation opposed by the government which Parliament adopted.<sup>119</sup> Bercow did so through a series of rulings on matters of Parliamentary procedure that marked a roll-back of the political settlement which gave cabinet control of the legislative agenda.<sup>120</sup> For example, he permitted a vote that suspended the operation of procedural rule that provides that “government business shall have precedence at every sitting”, to permit the proposal of the Cooper-Letwin Act as a private member’s bill.<sup>121</sup> As well, he permitted backbench MPs to take control of the legislative agenda again through another procedural rule that permits emergency debates.<sup>122</sup> The worry was that Parliament might seize the legislative agenda again to prevent a no deal Brexit before 31 October 2019 – for example, by passing legislation requiring the Prime Minister to withdraw the Article 50 notification.

Before the UKSC, the government flatly denied that it had acted with the goal of preventing Parliament from blocking Brexit, and asserted instead that the main reason to advise

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<sup>117</sup> European Act (Withdrawal) Act 2019, c. 16.

<sup>118</sup> European Act (Withdrawal) (No. 2) Act 2019, c. 26.

<sup>119</sup> Jonathan Sumption, “Brexit and the British Constitution: Reflections on the Last Three years and the Next Fifty” (2020) 91 *The Political Quarterly* 107 at 111.

<sup>120</sup> Daniel Glover, “Procedural innovation” in *The UK in a Changing Europe, Parliament and Brexit* (March 2020) 26 and Jack Simson Caird, “The Speaker’s role” in *ibid.* 28.

<sup>121</sup> Standing Order 14(1) of the House of Commons. For a copy of the motion, see House of Commons. (2019). *March 25 Debate*, vol 657 at 127.

<sup>122</sup> Standing Order 24 of the House of Commons. For a copy of the motion, see House of Commons. (2019). *September 3 Debate*, vol 664 at 135 to 139.

the prorogation of Parliament was that its legislative agenda was exhausted and ending the session would ensure Parliament “not wasting time”.<sup>123</sup> So the UKSC was put in the difficult position of ascertaining whether an executive power had been exercised for an improper purpose, in a politically fraught context. The Court reframed the challenge, by (a) shifting the focus away from the *purposes* underlying the advice, to its *effects* on Parliament’s ability to perform its constitutional functions, and (b) broadening those constitutional functions beyond enacting legislation (which is what had provoked prorogation) to ensuring “Ministers are accountable to Parliament through such mechanisms as their duty to answer Parliamentary questions and to appear before Parliamentary committees, and through Parliamentary scrutiny of the delegated legislation which ministers make”.<sup>124</sup> The Court held that this particular prorogation impaired Parliament’s ability to perform precisely these functions because of its unusual length at the very end of the Brexit process. Moreover, the government failed to provide a reasonable justification for prorogation, *inter alia*, because even if the government’s legislative agenda had been exhausted, Parliament could have still exercised its *oversight* powers with respect to Brexit. The Court concluded Parliament had never been prorogued – i.e., was still in session.

The Court’s distinction between legislation and oversight is crucial, because of how these functions are discharged *outside* the minority government context. When a government commands a Parliamentary majority, it also has control of the legislative agenda. Prorogation, in these contexts, does not impair Parliament from performing its law-making functions, because as a practical matter, it cannot exercise these powers independently of the government. In this respect, the long term effect of the procedural rulings of Speaker Bercow that suspended the government’s monopoly on proposing legislation, while breathtaking, are confined to the highly unusual circumstance of a minority parliament confronting a massive constitutional issue on which the governing party is divided. By contrast, prorogation impairs the exercise of oversight powers even when there is a majority government. Moreover, those oversight powers are opposition rights that are not under the control of the government. And so the UKSC has opened the door to a future case in which the opposition might challenge prorogation on the basis that a majority government is ducking accountability.

### **3. Oversight: Non-Confidence Motions and Committees of Inquiry in South Africa**

Another important example of the role of courts protecting the exercise of opposition rights in relation to oversight arose out of the attempts to remove President Jacob Zuma of South

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<sup>123</sup> *Prorogation Case* at para. 17.

<sup>124</sup> *Prorogation Case* at para. 46.



Africa from office.<sup>125</sup> Zuma accused of self-enrichment at public expense, through expensive renovations at his country home. These were initially defended as necessary for security upgrades, but South Africa's Public Protector – a law enforcement official created by section 182 of the Constitution of South Africa with broad powers to investigate and remedy official wrongdoing – concluded that the upgrades included non-security measures such as building a swimming pool, and that Zuma had breached his constitutional obligations to comply with an ethics code and to not use his position to enrich himself. She ordered Zuma to repay some of the renovation expenses and to report to the National Assembly within fourteen days and sent the report to the National Assembly.

The African National Congress (ANC) government used the transmission of the report to the National Assembly, where it commands an absolute majority, as a diversion strategy. The government created an *ad hoc* legislative committee that commissioned an alternative report from the minister of police, a member of Zuma's cabinet. That report exonerated the president; the National Assembly then passed a resolution endorsing that report and absolving Zuma of all liability. Opposition political parties turned to the Constitutional Court, which held in *Economic Freedom Fighters 1* that the National Assembly had acted unconstitutionally by usurping the authority vested in the Public Protector by s. 182(1)(c) of the Constitution of South Africa, a fairly traditional separation-of-powers argument.<sup>126</sup> But the Court went further. Section 42(3) of the South African Constitution imposes on the National Assembly the duty to scrutinize, oversee, and hold the executive accountable; section 55(2) further obliges the National Assembly to "provide for mechanisms" to hold the executive accountable, and to maintain oversight of the executive. The Court held that the National Assembly had breached these duties by setting aside the Public Protector's report without even considering it. Indeed, the Court strongly hinted that the combination of the unconstitutional refusal to examine the Public Protector's report, and commissioning and substituting a manifestly unconstitutional alternative, amounted to acting for an unconstitutional motive: to shield for partisan ends the president from accountability.

The Court also affirmed the Public Protector's finding that the president had acted unconstitutionally, which emboldened the opposition parties to attempt to impeach Zuma on the basis that he had committed a "serious violation" of the Constitution, under s. 89(1)(a). That vote unsurprisingly failed, given strong ANC party discipline. But the opposition parties went back to the Constitutional Court, which held in *Economic Freedom Fighters 2* that the failure of the National Assembly to put in place special procedures to regulate the impeachment process

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<sup>125</sup> This discussion is drawn from Sujit Choudhry, "Will democracy die in darkness? Calling autocracy by its name" at 579 to 582.

<sup>126</sup> *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others*, [2016] ZACC 11.

was unconstitutional.<sup>127</sup> The Court ruled that there has to be a special committee of the National Assembly to conduct “preliminary inquiry” into the meaning of the grounds for impeachment listed in the Constitution, and whether the impugned conduct fell into that category. The Court also held that such a procedure would be unconstitutional if party representation on the committee mirrors representation in the National Assembly, because “members of the majority party . . . may prevent an impeachment process from proceeding . . . to shield a President who is their party leader.”<sup>128</sup> What party composition *would* be constitutional the Court did not say. A plausible reading of the judgment is that a committee controlled by the majority party would be unconstitutional, with the implication being that the committee must be opposition controlled.

*Economic Freedom Fighters 2* continued the effort to square the circle between the partisan nature of the National Assembly and its constitutional duties to check the executive. But what practical goal would have been served by an impeachment process that would ultimately fail in the Assembly, where the president was supported by the majority party? An answer comes not from the Court’s opinion, but from news reports of the hearing before the Court, where the opposition parties stated that a special committee on impeachment would force Zuma to answer questions that he had thus not answered, presumably under oath.<sup>129</sup> Coupled with the requirement that the committee not be under ANC control, the hearings and resulting report – framed in terms of whether Zuma had violated the Constitution – would catalyze public debate and set the terms of the political agenda. Indeed, the Court looked ahead toward the eventual National Assembly debate on impeachment, by admonishing the Speaker (an ANC member) on the need to act impartially, and lecturing ANC National Assembly members that voting against impeachment for partisan reasons would be acting for an unconstitutional motive (*italics mine*):<sup>130</sup>

members may not frustrate the realization of ensuring a government by the people if its attainment would harm their political party. If they were to do so, they would be using the institutional power of the Assembly *for a purpose other than the one for which the power was conferred*. This would be inconsistent with the Constitution.

Zuma resigned as President of South Africa on 15 February 2018, about eight weeks after the judgment in *Economic Freedom Fighters 2*. He did so under the threat of a vote of no-

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<sup>127</sup> *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*, [2017] ZACC 47.

<sup>128</sup> *Ibid.* at para. 192.

<sup>129</sup> “Nkandla Returns to Haunt Zuma,” *Legal Brief*, January 1, 2018.

<sup>130</sup> *Economic Freedom Fighters 2* at para. 144.

confidence, an opposition right that is an alternative to impeachment. Under the South African constitution, non-confidence is an alternative mechanism for removing the President under Article 102(2). Prior to turning to impeachment, the opposition parties had first tried to table a motion of non-confidence, which had generated its own constitutional litigation arising from the ANC's attempts to block such a vote from being held at all, and to render it less likely to succeed. In *Mazibuko*, the Constitutional Court held that the Rules of the National Assembly were unconstitutional, because they vested the power to decide whether to whether to place a motion of non-confidence on the legislative agenda with the Programme Committee, which reached decisions on the basis of consensus.<sup>131</sup> The ANC dominated the Committee. For the Court, the rule was unconstitutional because "it would be within the discretion and generosity of the majority within the Programme Committee whether a motion of no confidence in the President would ever see the light of day".<sup>132</sup> In a later judgment, the Court held that the Speaker had the power to order a secret ballot for a vote of non-confidence, and that the Speaker must exercise her discretion "to enable effective accountability".<sup>133</sup>

The ANC decided that it would join the opposition parties to vote against him. A number of factors led the ANC to this decision, including the election of a new president of the ANC in December 2017, Cyril Ramaphosa, who was opposed by ANC elites allied with Zuma. Ramaphosa's election set the path for a transition, both through its rejection of Zuma and providing a successor at hand. Another factor, though, was the prospect of Zuma testifying under oath before a committee of the National Assembly as a consequence of *Economic Freedom Fighters 2*, which would have been damaging to the electoral prospects of the ANC – and highlights the importance of the opposition rights to exercise oversight to political competition. And this chain of events was started by *Economic Freedom Fighters 1*, which as Stu Woolman has argued, played a catalytic role in the process that led to Zuma's resignation.<sup>134</sup>

#### **4. Agenda-setting: Legislative due process in India**

An example of the judicial enforcement of legislative due process, which highlights its role as an agenda-setting power for the opposition, comes from India. India's Parliament is bicameral, consisting of the Lok Sabha (lower chamber) and Rajya Sabha (upper chamber). Under Article 107 of Constitution of India, in the event the two Houses disagree, the President may summon a

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<sup>131</sup> *Mazibuko v Sisulu and Another*, [2013] ZACC 28. The relevant rules were Rule 129(2)(c) and (d).

<sup>132</sup> *Ibid.* at para. 62.

<sup>133</sup> *United Democratic Movement v Speaker of the National v Assembly and Others*, [2017] ZACC 21 at para. 90.

<sup>134</sup> Stu Woolman, "A Politics of Accountability: How South Africa's Judicial Recognition of the Binding Legal Effect of the Public Protectors Recommendations Had a Catalysing Effect that Brought Down a President" (2016) 8 *Constitutional Court Review* 155.

joint sitting of the two Houses, in which case legislation can be passed by a majority of the members present. However, in the case of money bills, under Article 109, the Lok Sabha can enact legislation over the objections of the Rajya Sabha, which only has the power to issue “recommendations”, which it must do within 14 days (failing which the bill is deemed to have been passed by both Houses).

Although the Rajya Sabha is elected indirectly by state legislatures, it largely operates on party political basis, not as a chamber that reflects state interests. When both chambers are under the control of the same political party or coalition that commands a majority in the Lok Sabha, the government can easily secure the passage of any legislation. However, when the government does not control the Rajya Sabha, matters are quite different. To be clear, in such cases, the Rajya Sabha does *not* have a veto. Rather, it can force a joint sitting, where it is outnumbered by the Lok Sabha. How this plays out in practice depends on the relative sizes of both chambers and the party configuration of each. For example, at present, the Lok Sabha has 545 members, of which the governing Bhartiya Janata Party (BJP) led National Democratic Alliance (NDA) controls 336 seats, the Congress Party led United Progressive Alliance (UPA) controls 93 seats, and the remaining opposition parties’ control 113 seats. The Rajya Sabha has 250 members, and the NDA controls a minority of 116, the UPA controls 61, and the remaining opposition parties’ control 65. In a joint sitting, the NDA would control 452 seats out of a total of 695, easily commanding an overall majority.

Nevertheless, the NDA has made “rampant use” of the money bill procedure to bypass the Rajya Sabha entirely, in a series of controversial statutes,<sup>135</sup> most notably the law creating the Aadhar system of biometric identification for all Indians.<sup>136</sup> Pratik Datta, Shefali Malhotra and Shivangi Tyagi helpfully collect many examples of the use of the money bill procedure, including: the legislation to enact demonetization;<sup>137</sup> numerous amendments to the power of the Reserve Bank of India (RBI, India’s central bank), including providing a legal basis for allowing for flexibility with respect to inflation targeting in monetary policy,<sup>138</sup> and transferring regulatory authority over capital account transactions from the RBI to the central government;<sup>139</sup> amendments to revenue deficit targets; and the introduction of the Goods and Services Tax.<sup>140</sup>

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<sup>135</sup> Pratik Datta, Shefali Malhotra and Shivangi Tyagi, “Judicial Review and Money Bills” (2017) *National University of Juridical Sciences Law Review* 75 at 76.

<sup>136</sup> Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016.

<sup>137</sup> Specified Bank Notes (Cessation of Liabilities) Act, 2017.

<sup>138</sup> Finance Act, 2016.

<sup>139</sup> Finance Act, 2015.

<sup>140</sup> Central Goods and Services Tax Act 2017, Integrated Goods and Services Tax Act 2017, Goods and Services Tax (Compensation to States) Act 2017, Union Territory Goods and Services Tax Act 2017.

The NDA's use of the money bill procedure to create Aadhar was constitutionally challenged in *Puttaswamy II*.<sup>141</sup> Pursuant to Article 110(3), if a question arises whether a Bill is a Money Bill, the decision of the Speaker of the Lok Sabha "shall be final". The Speaker had declared the Aadhar bill a money bill. The Supreme Court of India upheld the Speaker's decision and rejected the constitutional challenge by a 4-1 vote. The Court was unanimous that the core provision of the Act, which authorizes the governments to require an Aadhar number for the purpose of establishing an individual's identity as a condition for receiving a subsidy, benefit or service, funded from the Consolidated Revenue Fund of India, fell within the definition of a money bill. The disagreement centred on the constitutionality of statutory language stating that an Aadhar number could be used for "other purposes". The majority reasons, written by Sikri J., read down this language to keep it within the scope of Article 110. Bhushan J.'s concurrence upheld this language on the basis of Article 110(g), which encompassed "any matter incidental" to the core features of a money bill.

Chandrachud J.'s dissent rejected this defence, arguing that the statutory permission to use Aadhar for other purposes rendered the Act unconstitutional on its face. But he also made an argument relying on legislative history. As he recounts, the Aadhar Act was originally introduced in 2010, in the Rajya Sabha (by the UPA coalition government). This earlier legislation was substantially similar to the statute ultimately adopted, and there was never any question of it being a Money Bill, which under Article 109 can only be introduced in the Lok Sabha. The Act was referred to the Standing Committee on Finance, which comprised 21 members from the Lok Sabha and 10 members from the Rajya Sabha. The Committee issued a report in December 2011 which was highly critical of the Act and urged the Government to withdraw the legislation. After the NDA took power in 2014, it withdrew the legislation from the Rajya Sabha in March 2016, and reintroduced the legislation in the Lok Sabha later that year. To Chandrachud J., this legislative history meant that "[t]he passage of the Aadhar Act as a Money Bill is an abuse of the constitutional process" and "a fraud on the Constitution" because it was a naked attempt to circumvent the Rajya Sabha.<sup>142</sup> As he stated:<sup>143</sup>

The ruling party in power may not command a majority in the Rajya Sabha. But the legislative role of that legislative body cannot be obviated by legislating a Bill which is not a Money Bill as a Money Bill. That would constitute a subterfuge, something which a constitutional court cannot countenance. Differences in a democratic polity have to be resolved by dialogue and accommodation.

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<sup>141</sup> *K.S. Puttaswamy v. Union of India, Writ Petition (Civil) No. 494 of 2012* (Sup. Ct. India, 26 September 2018) (*Puttaswamy II*).

<sup>142</sup> Chandrachud J. dissent at paras. 116 and 117.

<sup>143</sup> Chandrachud J. dissent at para 117.

Differences with another constitutional institution cannot be resolved by the simple expedient of ignoring it. It may be politically expedient to do so. But it is constitutionally impermissible. This debasement of a democratic institution cannot be allowed to pass. Institutions are central to democracy. Debasing them can only cause a peril to democratic structures.

For Chandrachud J., the casualty of the subversion of bicameralism is federalism. On his view, the “existence and the role of the Rajya Sabha” are part of the basic structure of the Constitution of India.<sup>144</sup> It “is an institution of federal bicameralism and not just as a part of a simple legislature”, as is reflected in the choice of Council of States, not Senate, for its English language name.<sup>145</sup> It “represents the constituent states of India” in the federal legislative process.<sup>146</sup>

However, Chandrachud J. misunderstands the value of the Rajya Sabha. Party political identification has long been more important than state political identity in how it operates. So the value of the Rajya Sabha when it is controlled by the opposition is legislative due process. The context here is the degradation of parliamentary debate in the Lok Sabha.<sup>147</sup> For example, the 2018 budget was passed by the Lok Sabha in 18 minutes without any debate, through the use of the “guillotine” procedure.<sup>148</sup> More recently, the government proposed to curtail Question Hour in the Lok Sabha.<sup>149</sup> Moreover, the Speaker of the Lok Sabha has facilitated the capture of the legislative process by the governing party in a partisan manner, undermining the normal function of legislative due process in the Lok Sabha as a platform for the opposition to present a counter-agenda. The Rajya Sabha offers a functional alternative, especially since it does not have an absolute veto on the Lok Sabha. In the current context, it can at most decelerate the adoption of legislation and provide a forum for the opposition to offer its views that they would have provided in the Lok Sabha. As the Supreme Court of India has recently questioned *Puttaswamy*

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<sup>144</sup> Chandrachud J. dissent at para 90.

<sup>145</sup> Chandrachud J. dissent at para 90.

<sup>146</sup> Chandrachud J. dissent at para 91. For an extended defence of this view, see Malavika Prasad and Gaurav Mukherjee, “Reinvigorating Bicameralism in India” (2020) 3 *University of Oxford Human Rights Hub Journal* 96.

<sup>147</sup> PRS Legislative Research, *Vital Stats: Functioning of the 16<sup>th</sup> Lok Sabha (2014-2019)* (13 February 2019).

<sup>148</sup> Arvind Kurian Abraham, “Parliament in Decline? The Ball is in the Speaker’s Court” *The Wire* (15 April 2018), posted at: <https://thewire.in/government/parliament-in-decline-the-ball-in-the-speakers-court>

<sup>149</sup> “After Opposition Uproar, Question Hour of 30 Minutes to Be Held in Parliament’s Monsoon Session”, <https://www.news18.com/news/politics/after-opposition-uproar-question-hour-of-30-minutes-to-be-held-in-parliaments-monsoon-session-2847379.html> (3 September 2020). For a legal defence of this move, see Jyotsna Punshi and Aditya Yadav, “The Curtailment of the Question Hour in the Indian Parliament”, *JURIST* (14 September 2020), posted at: <https://www.jurist.org/commentary/2020/09/punshi-yadav-curtailment-of-question-hour/>.

// and signaled its desire to potentially restrict access to the money bill procedure, it should do so in the name not just of federalism, but also of opposition rights.<sup>150</sup>

## E. Conclusion

In *How Democracies Die*, Steve Levitsky and Daniel Ziblatt argue that even the most thoughtfully drafted constitutions cannot check the slide into autocracy if they are not underpinned by a set of unwritten norms.<sup>151</sup> It is striking that both norms concern the opposition – mutual toleration (the acceptance of the legitimacy of the political opposition) and forbearance (the refusal to exercise power to its full legal limits to disable or destroy the opposition). On Levitsky and Ziblatt’s account, what the norms of mutual toleration and forbearance do is to ensure that the institutions and rules of constitutional democracy are exercised in a manner that serves their intended purpose, which I have argued is to provide a framework for bounded, partisan, pluralist contestation. Without those norms, those very same institutions and rules could be perversely “weaponized” to undermine the constitutional democracy and political pluralism they are designed to defend. Unwritten norms are fundamentally matters of a shared constitutional culture, not constitutional design. In the Commonwealth constitutional tradition, we would term them constitutional conventions. Mistakenly identified with the United Kingdom’s so-called “unwritten constitution,” unwritten norms are essential to the proper functioning of even the most detailed written constitutional texts.

It is undoubtedly true that unwritten norms in respect of the opposition are integral to the very possibility of constitutional democracy. But so is constitutional design that creates a framework for political competition. As Maria Paul Affon and Nadia Urbinati argue, “democracy requires at least two competitors exist, who are strong enough so that neither can impose her will on the other by force”.<sup>152</sup> This requires “a *meaningful* opposition and a *meaningful* pluralism of proposals must exist among which citizens can choose”.<sup>153</sup> Constitutions provide the necessary infrastructure for political competition, they argue, so much so that “the best criterion for assessing the strength of the opposition is “the capacity of institutions to preserve such

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<sup>150</sup> *Mathew v. South Indian Bank*, Civil Appeal. No. 8588 of 2019 (Sup. Ct. India, 13 November 2019), in which a five judge Constitution Bench referred the question of *Puttaswamy II*’s interpretation of Article 110 to a larger bench. See Gautam Bhatia, “The Tribunals Judgment – I: A Course Correction on the Money Bill” *Indian Constitutional Law and Philosophy* (14 November 2019), posted at: <https://indconlawphil.wordpress.com/2019/11/14/the-tribunals-judgment-i-a-course-correction-on-the-money-bill/>.

<sup>151</sup> Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Crown, 2018).

<sup>152</sup> Maria Paul Saffon and Nadia Urbinati, “Procedural Democracy, the Bulwark of Equal Liberty” (2013) 41 *Political Theory* 441 at 461.

<sup>153</sup> *Ibid.*

partisanship without being their prey".<sup>154</sup> In parliamentary democracies, this includes a regime of opposition rights.

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<sup>154</sup> Ibid.